

Reference No. HRRT 062/2015

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN SHARI ANDERSON

PLAINTIFF

AND DAVID BRYANT

FIRST DEFENDANT

AND VICE-CHANCELLOR, AUT UNIVERSITY

SECOND DEFENDANT

AT WELLINGTON – ON THE PAPERS

BEFORE:

Mr RPG Haines QC, Chairperson

Mr RK Musuku, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Mr S Davies-Colley for plaintiff

Mr D Bryant in person

Ms K Beck for second defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 12 April 2016

DECISION OF TRIBUNAL REFERRING COMPLAINT BACK TO
HUMAN RIGHTS COMMISSION AND RELATED ORDERS¹

¹ [This decision is to be cited as: *Anderson v Bryant (Referral back to Human Rights Commission)* [2016] NZHRRT 13]

Introduction

[1] By statement of claim filed on 23 October 2015 Ms Anderson complains of sexual harassment by Mr Bryant and relies on s 68(1) of the Human Rights Act 1993 to attach liability to AUT University which at the relevant time was Mr Bryant's employer.

[2] A statement of reply by AUT University was filed on 2 December 2015. No reply has been filed by Mr Bryant. At a teleconference convened by the Chairperson on 8 April 2016 he explained that when he was originally sent a copy of the papers by AUT University he was told by the person with whom he was dealing there was no need for him to do anything as the lawyers for AUT University would handle the matter. It was only on 7 April 2016 he learnt it was necessary for him to personally participate in the proceedings.

No investigation by the Human Rights Commission

[3] By letter dated 2 December 2015 the Human Rights Commission notified the Tribunal that although Ms Anderson first raised her complaint with the Commission on 22 December 2009 the file was closed on 8 February 2010 when Ms Anderson decided she would pursue the complaint through the University's complaints system. The complaint was briefly re-opened on 19 October 2010 when Ms Anderson informed the Commission she had not been successful in resolving the complaint herself but when Ms Anderson did not return calls from the Commission the file was closed for a second time on 3 December 2010. The complaint was re-submitted on 30 September 2015 but the Commission decided under s 80(2) of the Act to decline to take action as the events about which the complaint related were more than five years old and no new information had been presented.

The application for the complaint to be referred back to the Human Rights Commission

[4] In its statement of reply AUT University has asked that the complaint be referred back to the Human Rights Commission on the following grounds:

[4.1] AUT was never notified of the complaints made by Ms Anderson to the Commission.

[4.2] The parties have not attended mediation.

[4.3] The University was not made aware that Ms Anderson had outstanding issues relating to her complaint until these present proceedings were filed.

[4.4] Ms Anderson's complaint may yet be able to be resolved by the parties and/or the Commission (for example by mediation).

[5] By email dated 21 December 2015 Mr Davies-Colley gave notice the plaintiff did not oppose the application to refer the matter back to the Human Rights Commission.

Position taken by the parties at the teleconference

[6] At a teleconference convened by the Chairperson on 8 April 2016 Ms Beck pressed the application for referral. Mr Davies-Colley advised the plaintiff consented. Mr Bryant said he too gave his consent.

Discussion

[7] Section 92D of the Act relevantly provides:

92D Tribunal may refer complaint back to Commission, or adjourn proceedings to seek resolution by settlement

- (1) When proceedings under section 92B are brought, the Tribunal—
 - (a) must (whether through a member or officer) first consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise); and
 - (b) must refer the complaint under section 76(2)(a) to which the proceedings relate back to the Commission unless the Tribunal is satisfied that attempts at resolution, or further attempts at resolution, of the complaint by the parties and the Commission—
 - (i) will not contribute constructively to resolving the complaint; or
 - (ii) will not, in the circumstances, be in the public interest; or
 - (iii) will undermine the urgent or interim nature of the proceedings.
- (2) The Tribunal may, at any time before, during, or after the hearing of proceedings, refer a complaint under section 76(2)(a) back to the Commission if it appears to the Tribunal, from what is known to it about the complaint, that the complaint may yet be able to be resolved by the parties and the Commission (for example, by mediation).
- (3) The Tribunal may, instead of exercising the power conferred by subsection (2), adjourn any proceedings relating to a complaint under section 76(2)(a) for a specified period if it appears to the Tribunal, from what is known about the complaint, that the complaint may yet be able to be resolved by the parties.

[8] It will be seen that on the filing of any proceedings the Tribunal is under a mandatory duty to first consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise) and is required to refer a complaint under s 76(2)(a) to the Commission unless the Tribunal is satisfied that attempts at resolution will not contribute constructively to resolving the complaint, or will not be in the public interest or will undermine the urgent or interim nature of the proceedings.

[9] Addressing first s 92D(1)(a), it is undisputed no attempt has been made to resolve the complaint at the Commission level.

[10] Addressing next s 92D(1)(b)(i), the Tribunal has no reason to doubt that, if given the opportunity, both Mr Bryant and AUT University will engage with Ms Anderson and the Commission on a good faith basis and that, as submitted, mediation:

[10.1] May well contribute constructively to resolving the complaint; and

[10.2] Will assist the parties to better understand each other's respective positions and thereby assist with resolving the matter.

Conclusions

[11] We accordingly conclude the statutory criteria in s 92D(1)(a) and (b) of the Human Rights Act are satisfied (as are the terms of s 92D(2)) and that the complaint is to be referred back to the Commission for mediation. We are further satisfied it will not be contrary to the public interest for such mediation to take place. There is a clear interest in Ms Anderson, Mr Bryant and AUT University seeking to resolve their differences informally before engaging the Tribunal's processes.

ORDERS

[12] For the reasons given the following orders are made:

[12.1] Pursuant to s 92D(1) and (2) of the Human Rights Act 1993 the complaint by Ms Anderson is referred back to the Human Rights Commission for resolution by the parties and the Commission (whether through mediation or otherwise).

[12.2] So the proceedings are not left in suspension indefinitely, the parties are to provide the Tribunal with a progress report in six months time. Such report must be filed no later than 5pm on Friday 14 October 2016.

[12.3] The proceedings before the Tribunal are stayed in the interim with leave reserved to all parties to seek further directions if and when the need arises.

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Mr RPG Haines QC
Chairperson

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Mr RK Musuku
Member

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Mr BK Neeson JP
Member